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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

September 17, 1996

**VIA HAND-DELIVERY**

Mr. William Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: *Telephone Number Portability*, CC Docket No. 95-116

Dear Mr. Caton:

Enclosed are an original and 13 copies of the Reply Comments of WinStar Communications, Inc. in the above-captioned matter. Included is a copy to be date-stamped and returned with the courier. WinStar also respectfully submits a Motion to Accept Late-Filed Pleading with each copy of its Reply Comments.

Thank you for your attention to this matter.

Sincerely,



Dana Frix

Counsel for WinStar Communications, Inc.

Enclosures

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Before the  
Federal Communications Commission  
Washington, D.C. 20054

SEP 17 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Telephone Number Portability

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CC Docket No. 95-116

**MOTION TO ACCEPT LATE-FILED PLEADING**

Pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, WinStar Communications, Inc., ("WinStar") through undersigned counsel, hereby respectfully requests that the Federal Communications Commission ("Commission") accept the attached Reply Comments in the above-captioned proceeding one business day late. For the reasons discussed further below, good cause, as required by Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, exists for the grant of WinStar's motion.

WinStar encountered logistical difficulties beyond its control in the physical transmittal of the Reply Comments to the Commission's offices on the afternoon of September 16, 1996. These difficulties were related to the inclement weather and the obstruction of a major thoroughfare in close proximity to its counsel's offices. Although it made every effort to deliver the Reply Comments to the Commission's offices by the end of the Commission's official workday on September 16, WinStar was unable to deliver the Reply Comments prior to close of business on September 16, 1996.

Good cause exists for permitting WinStar to file its Reply Comments one business day late, and in granting WinStar's motion, the Commission would not cause harm or unfair prejudice to any other party to this proceeding. Any delay in this proceeding is nominal, since WinStar is submitting

its Reply Comments on the morning of the business day immediately following the deadline for filing. Furthermore, WinStar is sending a copy of its Reply Comments to all parties on the service list in this proceeding on September 17, so there should be minimal, if any, inconvenience to commenters. Finally, since there is no further opportunity to comment in this proceeding, and given the large volume of Reply Comments that will likely be filed with the Commission in this proceeding, a delay of less than one day will not prejudice the rights of any party or hinder the Commission's consideration of the submitted materials.

WinStar respectfully requests that the Commission find a showing of good cause to permit WinStar to file its Reply Comments one business day late.

Respectfully submitted,



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Attorney for WinStar Communications, Inc.

Dated: September 17, 1996

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of

Telephone Number Portability

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CC Docket No. 95-116

**REPLY COMMENTS OF  
WINSTAR COMMUNICATIONS, INC.  
ON COSTS AND COST RECOVERY ISSUES IN THE  
CONTEXT OF NUMBER PORTABILITY**

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Dated: September 17, 1996

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## EXECUTIVE SUMMARY

WinStar's reply comments may be summarized as follows:

**The Definition of Competitive Neutrality:** WinStar agrees with the principles announced by the Commission to ensure that its cost recovery mechanism is competitively neutral. These principles guarantee that no carrier should bear the burden of inefficient action on the part of other carriers, while simultaneously ensuring that long-term number portability receives the appropriate level of financial support from each telecommunications carrier.

Instead of meeting the goal of competitive neutrality, the proposals offered by a few commenters would permit incumbents to pass an excessive level of costs to new entrants, under the premise that long-term number portability should not cause customers to switch carriers. Such definitions undermine incentives for efficient implementation, and therefore the Commission should adopt its won proposed competitive neutrality principles.

**Responsibility for the Costs of Number Portability:** In light of comments by several parties claiming exemptions from responsibility for the costs of number portability, WinStar reemphasizes its position that the Telecommunications Act of 1996 ("1996 Act") makes clear that "all telecommunications carriers" are to bear the costs of number portability on a competitively neutral basis. No rational reading of the statute can exclude classes of carriers on the basis of size, type of service, geographic area, or any other distinction. While the allocation of costs among carriers is relegated to the Commission's discretion, the 1996 Act unambiguously mandates that all carriers provide support for long-term number portability.

**Allocation of Costs for Number Portability:** WinStar refutes the proposals of various commenters to allot the costs of long-term number portability on the basis of number of lines, retail minutes, or number of queries. Such cost allocation mechanisms place an inordinate burden on particular segments of the telecommunications industry and do not satisfy the mandate of competitive neutrality. Instead, WinStar joins the majority of commenters in supporting the Commission's tentative conclusion that costs should be allocated on the basis of net common carrier telecommunications revenues. Such a mechanism best approximates the measure of traffic for which each carrier is responsible and ensures that the costs of number portability are based on carrier earnings from sales to end users.

**Categorization of Number Portability Costs:** In order to implement a competitively neutral cost recovery mechanism for long-term number portability, WinStar contends that the Commission must only permit recovery of those costs shared by all telecommunications carriers. Permitting the recovery of carrier-specific costs of any sort would encourage dilatory or inefficient behavior, and allow carriers to recoup the costs of such behavior from competitors -- clearly contravening the Commission's goals of competitive neutrality. Furthermore, WinStar argues that even where the Commission permits recovery of direct carrier-specific costs, it should not treat such costs as exogenous for price cap regulation purposes. Such a policy would again permit price cap-regulated incumbents to pass the costs of number portability to competitors, and undermine the goals of competitive neutrality.

**Permissible Methods of Cost Recovery:** WinStar asserts that the Commission should adopt its proposed means of recovering the shared industry costs related to long-term number portability. WinStar also notes that competitive neutrality requires that the Commission prohibit carriers from recovering costs by passing them along to competitors. Therefore, WinStar reiterates its support for Commission action to prevent carriers from passing the costs of number portability through increased access charges or other carrier-to-carrier payments.

**Before the  
Federal Communications Commission  
Washington, D.C. 20054**

In the Matter of	)	
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Telephone Number Portability	)	CC Docket No. 95-116
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**REPLY COMMENTS OF  
WINSTAR COMMUNICATIONS, INC.  
ON COSTS AND COST RECOVERY ISSUES IN THE  
CONTEXT OF NUMBER PORTABILITY**

WinStar Communications, Inc. ("WinStar"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, submits these reply comments in accordance with the Commission's July 2, 1996 Further Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup> As noted in its initial comments filed on August 16, 1996, WinStar supports the Commission's effort to promulgate principles to govern the allocation and recovery of costs associated with long-term number portability. Only through sensible federal guidelines can the Commission ensure an effective, efficient, and equitable transition from interim to long-term number portability on a nationwide basis. The Commission, through this Further Notice, can provide the proper incentives for carriers and consumers to expedite the implementation of long-term number portability. WinStar's reply comments focus on several issues raised by other commenters that, if

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<sup>1</sup> *Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116, FCC 96-286 (rel. July 2, 1996) ("Further Notice").



adopted as federal policy, would serve only certain segments of the telecommunications market, thereby hindering the development of true competition and retarding the implementation of long-term number portability.

**I. THE COMMISSION SHOULD ADOPT ITS PROPOSED PRINCIPLES TO ENSURE COMPETITIVE NEUTRALITY(NPRM, ¶ 210)**

In its Further Notice (at para. 210), the Commission proposed that any cost recovery mechanism it implements should be governed by two principles: “(1) a competitively neutral cost recovery mechanism should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber; and 2) a competitively neutral cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn a normal return.” WinStar joins the wide majority of commenters in agreeing that both of these principles serve important goals in the implementation of long-term number portability.<sup>2</sup> The first principle is essential in making the application of its cost recovery mechanism efficient and equitable for all telecommunications carriers; it eliminates disincentives for carriers to support the implementation of number portability by ensuring that market-based factors -- not regulatory standards -- will affect a carrier’s ability to compete for customers. Similarly, the second principle confirms that the carrier’s own operating efficiencies, rather than the

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<sup>2</sup> Comments of Ameritech, at 4; Comments of Personal Communications Industry Association, at 4-5; Comments of Public Utilities Commission of Ohio, at 5; Comments of Sprint, at 4; Comments of Illinois Commerce Commission, at 4; Comments of MCI, at 2; Comments of Association for Local Telecommunications Services, at 3; Joint Comments of Colorado Public Utilities Commission Staff and Colorado Office of Consumer Counsel, at 5-6; Comments of Time Warner Communications Holdings, Inc., at 6; Comments of Florida Public Service Commission, at 2; Comments of Teleport Communications Group Inc., at 3; Comments of People of the State of California and Public Utilities Commission of California, at 4.

cost recovery mechanism adopted by the Commission, will be central in determining which carriers succeed in generating profits and retaining market share.

Both BellSouth and NYNEX asserted that the Commission's proposals will prove ineffective in keeping end users from switching service providers on the basis of regulatory standards. BellSouth urged the Commission to adopt alternative principles to "ensure that artificial, regulatory incentives or disincentives are not created with respect to end users changing service providers."<sup>3</sup> According to BellSouth, "the vast majority of costs required to implement [long-term number portability] will be incurred by incumbent LECs," and it suggested that the Commission should ensure that customers would make the decision to switch providers based only upon "quality, service, price, and convenience."<sup>4</sup> BellSouth's specific concerns focused on the fact that wireline and wireless carriers may participate in long-term number portability on a staggered basis, meaning that costs would be "incurred asymmetrically." *Id.* at 4. Therefore, BellSouth concluded, a competitively neutral cost allocation mechanism should apportion costs with close attention to the effect of the various dates on which carriers actually participate in the implementation of long-term number portability. *Id.* at 5.

A competitive new entrant that can implement number portability more efficiently and at lower cost should be free to attract subscribers from the incumbent. While WinStar shares the view that regulatory standards should not favor one type of carrier over another or affect the ability of

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<sup>3</sup> Comments of BellSouth, at 4. NYNEX also warned the Commission that its adopted allocation and recovery methods "should not encourage end users to switch service providers." Comments of NYNEX, at ii.

<sup>4</sup> Comments of BellSouth, at 4-5.

service providers to compete for customers and generate normal returns, WinStar submits that the concerns raised by the incumbent LECs are already addressed appropriately by the Commission's proposed principles. If the Commission should accept the arguments of BellSouth and NYNEX and adopt more stringent principles that affect the ability of end users to switch providers, it may in fact serve to protect the position of incumbents and undermine the competitive neutrality required by the statute. WinStar contends that the principles proposed by the Commission in its Further Notice already strike an appropriate balance by offering incentives for efficiency, technological innovation, and competition, while also ensuring that regulatory standards do not themselves impose artificial incentives for customers to switch providers.

## **II. THE TELECOMMUNICATIONS ACT MANDATES THAT ALL CARRIERS BEAR THE COSTS OF NUMBER PORTABILITY (NPRM, ¶ 209)**

WinStar contends that section 251(e)(2) of the 1996 Act mandates that all telecommunications carriers -- without exception -- be held responsible in some fashion for the costs of Long-term number portability. A significant group of commenters also supported this position in the initial comment phase.<sup>5</sup> According to section 251(e)(2), the burdens of number portability "shall be borne by *all* telecommunications carriers on a competitively neutral basis as determined by the Commission."<sup>6</sup> As is discussed in further detail in Part III. *infra*, the only discretion conveyed to the Commission by this provision is *how* to allocate costs among carriers; the Commission does

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<sup>5</sup> Comments of Bell Atlantic, at 1; Comments of Public Utilities Commission of Ohio, at 4; Comments of Omnipoint, at 3; Comments of Ameritech, at 1; Comments of SBC Communications, Inc., at 5-6; Comments of NYNEX, at 5; Comments of MFS Communications Company, Inc., at 6.

<sup>6</sup> 47 U.S.C. § 251(e)(2) (1996) (*emphasis added*).

not have authority under the 1996 Act to exempt specific classes of carriers from providing some level of financial support for the implementation of long-term number portability.

Several commenters proposed cost allocation and recovery schemes that would essentially exempt certain classes of carriers from providing any support for the implementation of number portability. A few commenters urged the Commission to adopt a per-query cost allocation mechanism, and concluded that “only carriers utilizing the database for their numbers should be responsible for payment of the charges.”<sup>7</sup> Similarly, the Telecommunications Resellers Association contended that the Commission should exempt “carriers that do not offer local service and hence will not be the recipients of ‘ported’ numbers.”<sup>8</sup> Several commenters made analogous arguments, claiming that competitive neutrality may require that particular types of carriers be excluded from shouldering certain costs for the implementation of Long-term number portability.<sup>9</sup>

WinStar asserts that such arguments contravene the clear statutory language of the 1996 Act, and ignore the fact that all carriers benefit from improvements in the telecommunications marketplace by virtue of long-term number portability. An examination of the legislative history supports the conclusion that Congress viewed number portability as an essential element in the development of a competitive market. The Commission itself cited legislative history to this effect in the *Further Notice*, noting the House Commerce Committee’s conclusion that “the ability to

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<sup>7</sup> Comments of Scherers Communications Group, Inc., at 3; Joint Comments of Colorado Public Utilities Commission Staff and Colorado Office of Consumer Counsel, at 6-7.

<sup>8</sup> Comments of Telecommunications Resellers Association, at 5.

<sup>9</sup> Comments of NTCA and OPASTCO, at 8; Comments of PCIA, at 4; Comments of California Public Utility Commission, at 5.

change service providers is only meaningful if a customer can retain his or her local telephone number.”<sup>10</sup> While the Commission can exercise its discretion in terms of how groups of carriers should bear costs under a competitively neutral cost allocation mechanism, the Commission cannot and should not permit carriers to avoid their statutory responsibility to bear some level of costs through the implementation of special cost allocation or cost recovery exemptions.

### **III. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO ALLOCATE COSTS BY NET COMMON CARRIER TELECOMMUNICATIONS REVENUES (NPRM, ¶ 213)**

WinStar joins several other commenters in support of the Commission’s tentative conclusion to allocate the costs of implementing long-term number portability by proportion to net common carrier telecommunications revenues.<sup>11</sup> As noted in its initial comments, WinStar submits that the use of a net revenue calculation mechanism is competitively neutral in that it is based on earnings from sales to end users, rather than transfers from competitors. A net revenue allocation mechanism ensures that no carrier will receive a windfall benefit from number portability to the competitive detriment of other carriers, who must absorb the costs of number portability and thereby suffer a reduction in their returns. By adopting such a mechanism, the Commission can guarantee that each carrier is responsible for costs only in proportion to the traffic it carries.

Alternative allocation proposals offered by other commenters do not meet the standards of competitive neutrality. A proposal to allocate costs on the basis of total retail revenues rather than

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<sup>10</sup> *Further Notice*, at ¶ 2 (*quoting* July 24, 1995 House Comm. on Commerce Rept. on H.R. 1555, at 72).

<sup>11</sup> Comments of MFS, at 6; Comments of Frontier, at 4; Comments of Teleport Communications Group, at 4; Comments of Nextel, at 3.

net telecommunications revenues undermines the principles of competitive neutrality,<sup>12</sup> because rather than excluding transfers between competitors from the calculation, it in fact incorporates such transfers into the cost allocation mechanism. Such a calculation mechanism distorts the allocation of costs and contravenes the Commission's effort to enforce competitive neutrality by permitting incumbents to pass costs along to competitors.

Several commenters also urged the Commission to adopt cost allocation mechanisms based upon a carrier's active lines,<sup>13</sup> the number of queries to the number portability database by a carrier's customers,<sup>14</sup> the number of telephone numbers maintained by a carrier,<sup>15</sup> or (most egregiously) only that portion of a carrier's revenues "related" to the imposition of number portability.<sup>16</sup> WinStar argues that none of these proposals meets the required principles of competitive neutrality. As it stated in its initial comments, WinStar believes that a per-line allocation mechanism places an excessive burden on local exchange carriers; SBC Communications, Inc. seems to admit this fact in its comments: "ILECs currently account for roughly two-thirds of the described [elemental access lines], with interexchange carriers and CMRS providers accounting for the remainder."<sup>17</sup> Such a

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<sup>12</sup> Comments of NYNEX, at 8-9; Comments of AirTouch Communications, Inc., at 7; Comments of Bell Atlantic, at 5.

<sup>13</sup> Comments of SBC Communications, Inc., at 7; Comments of Public Utilities Commission of Ohio, at 6.

<sup>14</sup> Comments of Omnipoint Communications, Inc., at 3; Comments of Scherers Communications Group, Inc., at 2-3.

<sup>15</sup> Comments of MCI, at 7; Comments of GSA, at 6.

<sup>16</sup> Comments of Nextel, at 3-4.

<sup>17</sup> Comments of SBC Communications, Inc., at 8.

proposal will not only undermine the principles of competitive neutrality, it will directly contradict the 1996 Act by exempting many carriers from any responsibility for the implementation of long-term number portability. Cost allocations based upon the number of queries to the number portability database, the number of telephone numbers a carrier has assigned to its customers, or a carrier's "number portability-related" revenues are all deficient for similar reasons, and also ignore the fact that all carriers -- not just those that directly utilize the number portability database -- will benefit from the increased competition that number portability will promote in the telecommunications marketplace. Thus, WinStar submits that the Commission should adopt a net revenue cost allocation mechanism, since such a mechanism avoids placing disproportionate burdens on any particular segment of carriers and recognizes that long-term number portability offers real benefits to all participants in the increasingly competitive telecommunications marketplace.

#### **IV. THE COMMISSION SHOULD NOT PERMIT THE RECOVERY OF ANY CARRIER-SPECIFIC COSTS IN THE CONTEXT OF NUMBER PORTABILITY (NPRM, ¶¶ 208, 221-225)**

As WinStar noted in its initial comments, the Commission should only permit recovery of those costs shared by all telecommunications carriers in order to comply with the 1996 Act's requirements of competitive neutrality. Competitive neutrality is not served by permitting any carrier to pass the costs of altering its own internal operations to its competitors. The Commission's proposal would give each carrier the opportunity to avoid the costs of any dilatory or inefficient behavior on its part, undermining the effective implementation of number portability as carriers bear no burden for the extra costs of using inefficient technology; instead, a carrier's competitors would be left to shoulder the burdens of covering these extra costs.

Shared industry costs are not subject to the same externalities as carrier-specific costs, and obviously must be recovered by carriers who support the implementation of long-term number portability. However, the distinction between direct and indirect carrier-specific costs for the purposes of cost recovery should be eliminated in light of the reasoning above. Recovery of either type of carrier-specific costs will introduce the same inefficiencies in the marketplace and offer poor incentives for the efficient implementation of long-term number portability. A carrier's internal response to number portability is not subject to any control by the Commission or other carriers, and the costs of such an ungoverned and unmonitored response should not be imposed upon competitors.

The arguments offered by several commenters that direct carrier-specific costs should be recoverable must be rejected. BellSouth contends, "Implementing [long-term number portability] is more than just loading LRN software."<sup>18</sup> Cincinnati Bell and GTE Service Corporation further contend that making carriers bear the direct costs of complying with the federal mandate would constitute an unconstitutional taking.<sup>19</sup> However, the fact that the mandate of number portability may require carriers to make more than simple upgrades should not mean that carriers are able to recover these additional costs, nor does the rational enforcement of a federal mandate constitute an unconstitutional taking. As MFS noted in its initial comments, the fact that the auto industry was required to include air bags in newly manufactured cars did not mean that Ford could compel Toyota to pay for adjustments to Ford's production line.<sup>20</sup> The scope of the adjustments -- however large

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<sup>18</sup> Comments of BellSouth, at 6.

<sup>19</sup> Comments of Cincinnati Bell at 6; Comments of GTE at 6.

<sup>20</sup> Comments of MFS, at 4.



or small -- that must be made to a carrier's internal operations cannot justify permitting a carrier to impose the costs of such adjustments on competitors. If the Commission wishes to promote the effective implementation of long-term number portability, it must not introduce inefficient externalities by allowing carriers to pool the costs of alterations to their internal operations.

As an additional matter, WinStar submits that the Commission should prohibit price cap-regulated carriers from treating individual number portability costs as exogenous costs. Treating the costs of number portability as exogenous will provide price cap-regulated carriers to pass their costs to competitors. Since competitors will not be able to engage in the same practice, the principles of competitive neutrality require that the Commission prohibit any carrier from treating number portability costs as exogenous costs. Moreover, a competitively neutral cost recovery mechanism should not permit a carrier to recover costs from its competitors for any reason. Finally, as MCI pointed out, "Exogenous treatment would give the incumbent LECs the opportunity to increase rates for services that do not face competition."<sup>21</sup>

**V. THE COMMISSION SHOULD ADOPT ITS PROPOSED METHOD OF SHARED INDUSTRY COST RECOVERY (NPRM, ¶¶ 216-221; 222-225)**

The Commission also sought comment on whether it can and should mandate a mechanism by which carriers can recover shared industry costs (at paras. 217-219) and carrier-specific costs (at para. 222). In the former instance, the Commission proposed dividing shared industry costs into three categories: 1) non-recurring costs; 2) recurring costs; and 3) costs for interaction with the number portability database. WinStar agrees with this division, and believes that in light of the clear statutory language, the optimal means of recovering shared industry costs is through monthly

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<sup>21</sup> Comments of MCI, at 12.

charges to all carriers on the basis of net revenues, as discussed by the Commission (at paras. 217-219). Such a recovery mechanism is consistent not only with the statutory mandate, but also recognizes again the benefits in terms of increased competition that number portability brings to the entire telecommunications industry.

In response to the Commission's discussion of recovery of direct-carrier specific costs (at paras. 221-225), WinStar reiterates its position that no carrier-specific costs should be recoverable for the reasons discussed above. If the Commission were to permit the recovery of direct carrier-specific costs -- *and WinStar emphasizes that permitting recovery of such costs would retard and reduce the efficiency of long-term number portability* -- it should not mandate a particular method of recovery to be used for carrier-specific costs directly associated with number portability. US West and ITCs suggest that the Commission should mandate that costs be recovered through a surcharge to all end-users, including other carriers.<sup>22</sup> However, such a proposal violates the principles of competitive neutrality, because as discussed above, carriers will be able to use a surcharge mechanism to pass its costs along to competitors without regard for its own efficiency or the effect of its decision upon the implementation of Long-term number portability. As WinStar indicated in its initial comments, each carrier should be made to bear the costs of its own response to the mandate of number portability, and also should have the flexibility to address those costs as it sees fit. A carrier, for example, should be able to pass its costs to its customers through some surcharge, or it could absorb the costs and essentially transfer the costs to its shareholders. The Commission should permit carriers to make their own business decisions in this regard, and refrain from mandating a

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<sup>22</sup> Comments of US West, at 14; Comments of ITCs, at 3.

specific method of cost recovery.

As an additional matter, WinStar emphasizes that while the Commission should offer carriers an appropriate level of flexibility in terms of recovering costs, it should prevent carriers from recovering costs by passing them on to competitors. Without safeguards against such activity, carriers will be able to undermine the principles of competitive neutrality by transferring costs through increased access charges, interconnection charges, or other carrier-to-carrier payments. Through the adoption of additional safeguards this proceeding and any other related docket, the Commission can guarantee that carriers are not disadvantaged by their competitors' response to number portability, expedite the implementation of Long-term number portability, and ensure that all carrier-to-carrier payments are cost-based in nature.

### **Conclusion**

For the foregoing reasons, WinStar respectfully requests that the Commission adopt rules consistent with principles discussed herein.

Respectfully submitted,



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Dated: September 17, 1996

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of September, 1996, copies of Reply Comments of WinStar Communications, Inc., in Docket No. 95-116, were served via Hand Delivery\* or First Class Mail, U.S. postage prepaid, to all parties on the attached service list.

  
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Wendy D. Mills

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